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Issue date: 11Jun2002

William Fraser 2001 LHC 03150

Claimant

v.

Copper T. Smith
Employer

and

ALMA Claims
Carrier

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901, et seq., (the "Act"), and the regulations promulgated thereunder. A hearing was held on April 17, 2002 in Wilmington, North Carolina. Mr. Fraser, the Claimant, was represented by Andrew Hanley, Esquire, Crossley, McIntosh, Prior and Collier, Wilmington, North Carolina. The Employer/Carrier is represented by Jerry L. Wilkins, Jr., also of Wilmington. At hearing, three (3) administrative law judge exhibits, marked as ALJ 1-3[1], were admitted into evidence. The Claimant offered seven (7) exhibits (hereinafter referred to as "CX" 1-7), and the Employer/Carrier offered seventeen (18) exhibits (hereinafter "EX" 1-18), and all of these were entered into evidence. The Claimant, and John Walton Calicutt, an investigator, testified. After the receipt of the Hearing Transcript, both parties filed briefs.

The following stipulations were agreed upon by the parties. See Hearing Transcript, hereinafter "TR" at 6-9:

1. The Longshore and Harbor Worker's Compensation Act applies to this claim.
2. Jurisdiction is proper.
3. Mr. Fraser, Claimant and Cooper T. Smith, Employer, were in an employer/employee relationship at the time of the January 16, 2001 accident.
4. Employer Cooper T. Smith admits that this claim involves a compensable accident.
5. The accident arose in the course and scope of the employment.
6. The Employer had timely notice of the accident.
7. Mr. Fraser was paid temporary total benefits at a rate of $441.41 per week from January 17, 2001 to February 15, 2001.

[1] Consisting of the Notice of Hearing and the parties' Pre-hearing Statements.

8. The average weekly wage is $666.61.

9. Mr. Fraser was paid temporary partial benefits at a rate of $441.41 per week from March 26, 2001 to August 9, 2001.

After a review of all of the evidence in this case, I accept that the above stipulations are borne by the record. In addition, the Employer/Carrier admitted the following:

1. Surgery was refused by the Employer/Carrier. CX 7, Admission Number 4.

2. The Claimant informed the claims adjuster to the carrier that he had a contracting business. CX 7, Admission Number 10.

3. The Claimant informed the claims adjuster that he was trying to continue the general contracting business but was having increased difficulty due to his elbow injury. CX 7, Admission Number 11.

Issues

Both parties agree that the following are to be decided:

1. Authorization of surgery, and

2. Temporary partial disability benefits.

The Claimant argues that he has not achieved maximum medical impairment, TR 89. The Employer/Carrier argues that the Claimant's elbow is healed, TR 90.

Facts

According to the testimony, the stipulations of the parties, and the medical histories supplied by the Claimant, Mr.Fraser was working on a barge as an employee of the Employer, Cooper T. Smith. cinching down a bundle strap at his job at the port when the handle moved forward quickly and he struck his right elbow. CX 4; TR 20-21, EX 9. This condition has been diagnosed as "persistent epicondylitis". CX 3; CX 1; The Claimant is right hand dominant. TR 19, EX 9. He testified that his job entailed loading and unloading ships, lifting, bending, twisting, picking up, prying, and getting cargo into the ship, TR 18. The Claimant testified that as of the date of accident, the elbow was painful, and soon after the accident it began to swell. TR 21. He finished the work day, and that evening at home he tried to soak the elbow to relieve the pain and swelling. Id. The next day, he notified the Employer that he was going to Carteret General Hospital (Hospital record at CX 6 at 102-109). The Hospital referred him to Dr. Robert E. Coles, an orthopedic surgeon (CX 1, CX 2, CX 6, 78-82 and 90-93, EX 9). On January 26, 2001, Mr. Fraser was placed on "light duty" by Dr. Coles, CX 2 at 7. He was also seen by Charles Pfaff, M.D., who also placed him on light duty, EX 6 at 95.

For several days after the accident, the Claimant complained of headache, dizziness and numbness in the arm and was seen by Dr. Jack Crossland (CX 6, 71-75) who referred him to Kevin Good, M.D., a neurologist, CX 6 99-100, EX 12, 32-33.

In the course of several months' treatment by Dr. Coles, Mr. Fraser was given a series of injections, and was prescribed a tennis elbow strap, exercises, physical therapy and anti-inflammatory drugs. TR, 22-24; CX 1, CX 2, 5-11, CX 6, 78-82 and 90-93, EX 9 The record shows that the Claimant saw Dr. Coles a total of eleven (11) times between January 26 and July 10, 2001 (CX 1, EX 9). According to the Claimant, Dr. Coles recommended surgery (TR. 24). The surgery would have been performed on an outpatient basis and would have taken Dr. Coles

about twenty (20) minutes to perform, CX 2, 8. The Claimant alleges that he was led to understand that surgery would permit return to work within a month to six weeks, TR. 25. Dr. Coles' records for April 18 in part reflect the following:

> Initial response to conservative management has waned. The patient is virtually begging for surgery for some definitive, more aggressive, intervention. I explained to him this sometimes takes a while to get better. He says that it is getting significantly worse with the limitations of movement and he is not happy. He will go to a second opinion per his Workmen's Comp. If they feel we should proceed, we will consider a tennis elbow release. The patient says that he is currently unable to work and he is also self-employed and is losing a large amount of money currently. He will follow up after the second opinion.

CX 1, EX 9 at 17. Dr. Coles substantiates that surgery, a lateral epicondyle release, was recommended on April 18, 2001. CX 2, 7- 8. "At that time I recommended, because he had absolutely no improvement, that we do a lateral release, which involves making a small incision over that area and basically taking the unhealed part out and stimulating some healing in those tendons where they insert or connect to the bone." Id, 7-8.

The employer refused to authorize the surgery, in reliance in part on the basis of a second opinion with the Employer/Carrier selected physician, Richard Bahner, M.D. of Atlantic Orthopedic, who examined Mr. Fraser on May 11, 2001. Dr. Bahner diagnosed recalcitrant lateral epicondylitis and possible radial tunnel syndrome. He prescribed a a digital stretching program, oral medication with possible supplements with injections, bracing, and activity modification. "Icing and other over-the-counter medicines as well as ultrasound may be of benefit. When the problem is recalcitrant to these things we need to consider surgical intervention", CX 6, 88 EX 10, 22.

Subsequent to Dr. Bahner's examination and report, Dr. Coles referred the Claimant for further physical therapy, as his condition did not improve, CX 1, CX 2, CX 6, 78-82 and 90-93, EX 9. The notes from the physical therapist noted that although the Claimant had eleven (11) treatments between June 5 and July 9, 2001, physical therapy had not helped., CX 2, CX 6, 15-29. On July 10, Dr. Coles released the Claimant as a patient, as he determined that the Carrier and not he, had dictated the treatment. He testified that surgery was necessary due to the failure of the other treatments, CX 2, 10-11. The carrier requested Dr. Coles to sign a return to work form, Id. 11-12. "...[S]he wanted me to recommend he go back to work...", Id. He refused to do so. Dr. Coles indicated that with surgery, Mr. Fraser could return to work in six to eight weeks, Id 13.

Mr. Fraser has tried to work, but no physician has released him to return to work at full duty. TR 35. The Claimant had his own construction business in addition to longshoring. He had a contract to install hot water heaters, in conjunction with Lowe's, a hardware chain store, Id 25-28. However, the Claimant alleges that because he was limited in his capacity, he began to lose contracts to install hot water heaters, Id 27-28. Eventually, the Claimant lost his business and filed for bankruptcy, Id. 33.

According to the Claimant, he can use a hammer for about a half an hour to forty-five minutes, but after that he had pain in his elbow, a tingling in the arm and numbness in the hand, Id. 26, 39.

He testified that he would not be able to lift repetitively. He admittedly can lift 25 pounds easily, but maintains that he could not do it for two hours. He doubts that he could do it twenty repetitions without pain, Id 35. He says he can not use a hammer for an hour, Id. He continues to have recurring pain and swelling in the elbow, Id, 39.

During the period from January to August, the Claimant advised the carrier that he had to work to make mortgage payments and to keep up the business. TR, 32. He tried to return to work at the Port, but he was told by the union that a medical release must be issued before a return to work there would have been authorized. TR 35. The Claimant described jobs that lasted as much as four to five weeks, Id, 33. He described a job at Carteret General Hospital, where he was laying out concrete stairs, which required the operation of a jackhammer, which he could do for only about a couple of hours, Id.

The Claimant also alleges that Dr. Scully also told him that surgery was needed, Id,. 31. The Claimant testified that he is still interested in having surgery performed so that he can return to work, Id, 30.

After August 8, 2001, when the Claimant's benefits were terminated by the Employer/Carrier, the Claimant continued to work. He testified that he had worked at EBSCO Construction, when he worked on the stairs, described above, and also at Carteret General Hospital. As of the date of hearing, the Claimant had returned to work three to four days per week, eight hours per day, Id, 39-40. The Claimant presented W-2 tax forms that show he worked at Cieszko Construction Co in 2001, earning $875.00; D.S. Simmons, Inc, earning $2,166.00; and Cooper T. Smith, the Employer/Carrier , $65.00. He also submitted earnings records from Simmons showing that he earned $312.00 for a twenty six (26) hour work week from January 23 to January 29, 2002; $480.00 for a forty (40) hour work week from March 20 to March 26, 2002; and between December 26 and January 1, 2002, the Claimant worked a thirty two (32) hour work week, earning $384.00. CX 5. Although he testified that he had returned to work in November, he did not furnish any records for that period of time, although he did say he worked for D.S. Simmons, and did provide a W-2 from that employer, TR, 40-41. He testified that during the time he worked, he worked sporadically, Id. He testified on cross examination that he has not turned down any work due to his elbow problem, TR 48.

The Claimant admitted on cross examination that he may have carried tar paper rolls that weigh as much as eighty pounds when he was working, TR, 44. The Claimant testified that ideally, he'd like to have worked in a supervisory capacity. However, at times, in order to keep the job, he'd do the work himself, Id, 45-46. On redirect examination, Mr. Fraser alleged that he could lift tar paper, but not repetitively, Id, 48.

Mr. Calicott, a private investigator, testified that he surveilled Mr. Fraser on two occasions, August 22-23 and March 19-20, 2002. Mr. Calicott's employer performed earlier surveillance, Id, 53-58. In August, Mr.Fraser was observed performing a "general remodeling job", and was seen lifting a shower enclosure, with help from another person. They had to carry it thirty feet to get it

to the house, and lifted it through a window, Id, 59. On the same day, Mr.Fraser was observed sawing, lifting, carrying including a large tool box. According to the witness, he is trained to detect pain from the body language of the subjects, and he did not exhibit pain, Id, 59-61. Mr. Fraser was also seen lifting ladders. The next day, he was followed to the same job site, but the Claimant spent most of the day inside, beyond observation. However, the Claimant realized that he was the subject of an investigation and confronted Mr.Calicott. He was emphatically ordered to leave, and did so, Id 62-63. In March, Mr.Fraser was tailed to Carteret General Hospital, where he was working on the roof. He was seen climbing a ladder and scaffolding, carrying tar-paper on his right shoulder, Id, 65-66. The next day, the Claimant returned to the roof, where he was observed hammering with the right arm, Id, 66-68. Again, the witness did not observe visible signs of pain, Id.

Mr. Calicott admitted on cross examination that he has had no medical training. And can not whether any given person will wince from pain, Id 70. Of eight days' surveillance, the Employer/Carrier used only parts of two days' observations in its trial presentation, Id, 79.

Mr. Fraser does not deny lifting the shower stall, but alleges that his arm hurt after he did it, Id, 88.

I viewed the videos taken August 22-23 and March 19-20, 2002 (EX 17). On August 22, the Claimant is seen lifting a tub enclosure and a bath tub. On March 19, the Claimant is seen working on a roof, lifting, carrying equipment, supplies and tools, tacking tar-paper and applying tar. He used the right hand and arm extensively. He is seen cutting and measuring. The Claimant hammered for about half an hour to forty five minutes intermittently. He climbed and descended using a ladder, carrying tools and tar-paper. On March 20, he is seen using the ladder, but he is not seen working. The surveillance log lists observations made April 5, 6, 7,24, 25, 27, August 17, 18, 19, 21, 22, 23, 2001 and March 19-20, 2002 (EX 18).

Discussion Re: Medical Treatment

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. §§ 907(a).

The Fourth Circuit has held the claimant has a burden of proving the elements of his claim for medical benefits and reversed the Board's requirement that the employer prove with substantial evidence that the claimant's private physician did not file a report within Section 7(d). ***Maryland Shipbuilding & Drydock Co. v. Jenkins***, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). See ***Shahady v. Atlas Tire & Marble***, 13 BRBS 1007, 1014 (1981), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), cert. denied, 459 U.S. 1146 (1983) (Section 20(a) does not apply to Section 7).

A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. ***Turner v. Chesapeake & Potomac Tel. Co.***, 16 BRBS 255 (1984) at 257-58. A judge has no authority to deny a medical expense on the ground that a physician's expertise, customary fees, or result of treatment were not documented. Id. at 257.Employer is only liable, however, for the reasonable value of medical services. See 20 C.F.R. § 702.413; ***Bulone v. Universal Terminal & Stevedoring Corp***., 8 BRBS 515, 518 (1978); ***Potenza v.United Terminals, Inc***., 1 BRBS 150 (1974), aff'd, 524 F.2d 1136, 3 BRBS 51 **(2d Cir.** 1975). Medical care must be appropriate for the injury. See 20 C.F.R. § 702.402. Therefore, a judge may reject payment for unnecessary treatment. ***Ballesteros v. Willamette Western Corp***., 20 BRBS 184, 187 (1988); ***Turner***; ***Scott v. C & C Lumber Co.***, 9 BRBS 815 (1978).

The Claimant argues that after several months of unsuccessful conservative treatment a lateral epicondyle release was recommended. He maintains that Dr. Coles, the treating physician, has opined that with the surgery Mr. Fraser could likely have returned to work in six to eight weeks. This surgery was denied by the carrier. Mr. Fraser wanted the surgery so that he could return to work as soon as possible and also continue his general contracting business. Claimant argues that no medical evidence has been presented by the employer to contradict the recommendations of the treating physician, "the second opinion physician and a third opinion". Claimant Brief.

The Claimant argues that Dr. Bahner's May 11, 2001 second opinion confirmed Dr. Cole's diagnosis of work-related lateral epicondylitis. CX 6. Dr. Bahner recommended further physical therapy and told Mr. Fraser that if that physical therapy was not successful then he would "definitely" need the surgery recommended by Dr. Coles. TR 29. Dr. Bahner's notes confirm this recommendation: ". . . digital stretching, oral medication . . . icing and other over the counter medicines as well as ultrasound may be of benefit. When the problem is recalcitrant to these things we need to consider surgical intervention." Id. Dr. Coles had already tried all of these modalities before recommending surgery. CX 2 39.

Employer/Carrier argues otherwise, alleging that a reading of Dr. Coles' April 18, 2001 note clearly indicates that surgery is merely a consideration at this point of treatment because Dr. Coles described Claimant as "begging for surgery". EX 9,19. Employer/Carrier infers that Dr. Coles deferred to second opinion. According to Dr. Coles' note, "if they feel we should proceed, we will consider a tennis elbow release." EX 9, 19.

On May 11, 2001, Claimant saw Dr. Richard Bahner for that second opinion. Dr. Bahner recommended further conservative treatment in lieu of surgery at that time. EX 10, 22. Although Claimant interprets Dr. Bahner's opinion as substantiation for the need to operate, Employer/Carrier argues that Dr. Bahner is "clearly" not considering surgery at that time. "Therefore, Dr. Bahner did not feel that anyone should proceed with surgery. Dr. Coles' recommendation for consideration of surgery is clearly conditional on Dr. Bahner's concurrence. Dr. Bahner did not concur and instead recommended further conservative treatment prior to possible surgical intervention. As a result of, Defendants declined to authorize surgery at that

time." Employer/Carrier Brief.

According to the Employer/Carrier, following Defendant's initial refusal to authorize surgery in this case, Claimant began to make inconsistent statements regarding his current medical status to his doctors and cast doubt on the veracity of his alleged ongoing complaints. In fact, the Employer/Carrier argues that the Claimant committed fraud by mis-representing his residual functional capacity to Dr. Coles while he was in treatment. It maintains the this is shown by an April 2001, surveillance video. It also argues that on his "very first" visit to Dr. Coles following Defendants' denial of surgical authorization, Dr. Coles begins to notice inconsistencies in Claimant's statements to him regarding his ability to perform work. EX 9,19. Dr. Coles states in his May 29, 2001 note that Claimant "says he's having difficulty working with tools and only worked 12 hours in the last month, but his story is a little bit inconsistent." EX 9, 19. During his deposition, Dr. Coles further elaborated on that remark in Claimant's notes. Dr. Coles admitted that he generally would not note slight inconsistencies in someone's medical notes. Dr. Coles went on to say, that he felt as though "there's some real ambiguity going on" and that Claimant's statements were "intuitively questionable". Coles Deposition, 19, l.14- 120. Employer/Carrier Brief.

Employer/Carrier argues that by July, 2001, Dr. Coles again remarks that he is having difficulty determining the veracity of Claimant's continued complaints. Dr. Coles, referring to Claimant's right elbow, stated "I have difficulty discerning the *true* degree of his discomfort and how much he can use it [and] I am recommending that he seek treatment elsewhere." (emphasis added) EX 9, 19. Employer/Carrier argues that remarks by Dr. Coles in Claimant's medical records clearly indicate that Claimant is being "less than forthright" with his treating physicians and arouse suspicion "as to the genuine degree" of any residual problems he may be having with his elbow. See Employer/Carrier Brief.

During his deposition on March 20, 2002, Dr. Coles was also shown surveillance videotape that was obtained on August 23, 2001. The Employer/Carrier argues that on the videotape, Claimant was recorded lifting a 150-pound fiberglass tub enclosure with the help of one other gentleman. "Claimant is seen lifting the enclosure, carrying it for a distance, and then lifting the enclosure into the window of the residence where he was working. EX 17. After reviewing this video, Employer/Carrier emphasizes that Dr. Coles stated that Claimant's behavior was not consistent with someone needing surgical intervention." Employer/Carrier Brief, citing to CX 2,.25. The Employer/Carrier also argues that Dr. Coles also testified that seeing Claimant perform this work would make him "less inclined to recommend surgery in this case". Employer/Carrier Brief; CX 2,.26. "Lastly, Dr. Coles went on to testify that, as of August 23, 2001 he would not have recommended an epycondyle release for Claimant." Employer/Carrier Brief, CX 2, 27.

Since the deposition of Dr. Coles was taken, additional video surveillance has been obtained. Employer/Carrier alleges that the video surveillance reveals Claimant working "on an even more consistent and intense basis. Given that Dr. Coles testified that he would not recommend surgery based on the August 2001 surveillance, it can be reasonably inferred that his opinion would not

change in light of this additional evidence of Claimant's physical abilities. In any event, Claimant has offered no evidence to demonstrate that his condition has worsened since August 2001. Therefore one must assume that Claimant is, at worst, at the same level of ability some seven months later. Common sense would suggest that, in light of an aggravation performing other work, it has improved." Employer/Carrier Brief.

After a review of all of the evidence, I accept that Dr.Coles had unequivocally authorized surgery. Moreover, I also accept that he had placed Mr. Fraser on "light" duty and neither he nor any other medical provider has released the Claimant to full work status. After Dr. Coles acceded to Dr. Bahner's recommendations, he still considered the Claimant to be a candidate for surgery. The carrier attempted to force Dr. Coles to sign a return to work form, CX 2 11-12. Although the carrier maintains that Dr. Coles recommendation for surgery was conditional, Dr. Coles testified to the contrary, CX 2, 14. Employer/Carrier highlights Dr. Coles' note, "if they feel we should proceed, we will consider a tennis elbow release." EX 9, 19. However, despite an aggressive cross examination, Dr. Coles would not accept that the second opinion would have been controlling, CX 2, 17, 37. He testified that but for the carrier's intervention, he would have performed surgery, Id 37-39. He maintained that the Carrier substituted its judgment for his medical judgment, Id. I note that even if Dr. Bahner's recommendations were controlling, the conditions set forth by Dr. Bahner have been substantially complied with as further physical therapy was administered. Therefore, if these were conditions precedent to surgery, they were met by July 10. I accept, further, that as Dr. Bahner stated, " ...we need to consider surgical intervention," this is evidence of substantiation of the Claimant's position.

In essence, Employer/Carrier also argues that the inconsistencies noted above impeach the Claimant's depiction of his complaints and undermine Dr. Coles' opinions regarding the need for surgery. I find that any inconsistencies are, at most, trivial. I also do not accept the Employer/Carrier plea to "common sense" in that the surveillance was done after the Claimant's benefits were terminated and after he had undergone an unsuccessful regimen of physical therapy, where over eleven sessions, the Claimant was closely monitored in a medical setting for reaction to specific physical functions.CX 2, CX 6, 15-29. On July 10, Dr. Coles released the Claimant as a patient, as he determined that the carrier and not he, had dictated the treatment. He testified that surgery was necessary due to the failure of the other treatments, CX 2, 10-11. I accept that he reviewed the physical therapy treatment and give great weight to his opinion on this issue.

It is true that when Dr. Coles was shown the May 29 note stating that the Claimant was attempting some work, there were "inconsistencies" in the record, he acknowledged that the responses are not clear, CX 2, 19-20. However, the Claimant was acknowledged to have been in temporary partial disability status, and all were aware that he had been working, with restrictions to "light" duty imposed by Dr. Coles and several other physicians.

Dr. Coles was asked by the Employer/Carrier, "And would continuing to engage in construction work aggravate or exacerbate the type of injury that Mr. Fraser had?" Dr. Coles responded that it could, depending on the activity. CX 2 at 21. "And could that increase the need for surgical

intervention rather than his injury?" Dr. Coles said it could slow the resolution of the symptoms. Id, 22. After shown the surveillance video depicting the Claimant moving a fiberglass tub enclosure, Dr.Coles acknowledged that it could aggravate the condition, but could not comment on the intensity and severity of pain, or render an opinion whether the Claimant could return to work at full duty as a result of the activity shown by the video, Id 22-24. He did say, that if Mr. Fraser were able to perform the depicted activity without discomfort, that surgery would be contraindicated, Id. 24-25. He did acknowledge that he would have some question about the Claimant's credibility, but he could not acknowledge that he would have ruled on recommended surgery on the basis of the video, Id 26-27. However, Dr. Coles on redirect, noted that there was no inference of malingering or secondary pain syndrome. In fact, the Claimant wanted, at all times, to be able to get back to work as soon as possible, Id. 28. The video shown to Dr. Coles shows the Claimant performing moderately heavy exertion for less than one minute, Id 31. With epicondylitis, if the claimant is willing to endure pain, he can lift heavy objects, Id 31-32. Moreover, Dr. Coles followed Dr. Bahner's treatment suggestions and as the Claimant did not improve with conservative treatment, surgery remains an option.

I do not accept Mr. Calicott's testimony that the Claimant was pain free during activity. Mr. Calicott admitted, on cross examination, that he has no basis to measure the Claimant's reaction to work related activities and has no medical training in pain evaluation. Moreover, I note the proffer of the "150 pounds" for the weight of the tub enclosure, is a fact that was not proved in evidence, and any reliance on it is speculative. I also give little weight to Mr. Calicott's assertions regarding his ability to "read" pain from non-verbal messages such as the absence of signs of wincing. I give no weight to observations noted in Exhibit 18 by Mr. Calicott and other private investigators regarding the absence of signs of pain in the record.

I accept Claimant's contention that he was unable to perform some of the heavier work required to install hot water heaters; on the other hand, I do not accept that he is limited to intermittent work at "light" work at his residual functional capacity. His testimony was that he was laid off from the job at Carteret General Hospital but has been rehired. He also indicated that he was at all times ready to accept light work, but early on concentrated on attempting to save his business installing hot water heaters.

I do not accept the argument that there has been an intervening cause or an aggravation proved by the colloquy set forth by deposition in CX 2. I note that even if the Employer/Carrier's contention were true, the Employer/Carrier would be liable for any medical benefits stemming from work. When a claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, the employer is liable for the entire resultant disability and for medical expenses due to both injuries if the subsequent injury is the natural and unavoidable result of the original work injury. If the subsequent progression of the condition, however, is not a natural or unavoidable result of the work injury, but is the result of an intervening cause, the employer is relieved of liability for disability attributable to the intervening cause. ***Colburn v. General Dynamics Corp***., 21 BRBS 219 (1988). The Employer/Carrier has a duty to proffer

evidence to show otherwise but has failed to do so.[2]

I also credit the Claimant's pain testimony, in that I accept that although he is restricted in the use of the elbow, and that continued use can cause greater damage, I accept that when he did use the arm for such activities like using a hammer, picking up tar-paper, and carrying heavy objects such as a tub enclosure, the Claimant became painful and the elbow became swollen. I accept that he is medically limited to lifting about twenty five pounds with the dominant arm, and although he may have the capacity to lift more weight occasionally, he does so at his peril. I accept, based on a review of the entire record, that the Claimant has no restriction to walking, carrying with the sub-dominant arm, lifting with the sub-dominant arm, and that he has no postural limitations or environmental limitations.

Although Employer/Carrier argues:

> The only evidence of Dr. Scully's recommendation for surgery comes from Claimant's self serving testimony about what Dr. Scully had said. TR 30-31.

the record shows that Dr. Scully's records note that an associate, R. Mark Rodger, M.D., registered an entry dated September 21, 2001 in which surgery is discussed, CX 3. Although this does not fully substantiate that surgery is warranted, it does contradict the Employer/Carrier contention, and it does substantiate an implication that surgery may be necessary. I credit Dr. Scully's and Dr. Rodger's records as substantiation of Dr.Coles' diagnosis and opinions, and attribute significant weight to them. I also credit Dr. Bahner's opinions as substantiation of Dr. Coles' diagnosis, but do not attribute any greater weight to his opinion as he hi merely an examining physician, and saw the Claimant on only one occasion, whereas Dr. Coles saw the

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[2] The law of supervening independent causes is unsettled. ***Bludworth Shipyard v. Lira***, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983). In ***Lira v. Bludworth Shipyard***, 14 BRBS 682 (1982), the Board held that an employer must pay for an injured employee's detoxification from narcotics when the employee, a former drug addict, became re-addicted as a result of treatment for a work-related back injury. On appeal, however, the order of payment was reversed on the ground that the re-addiction was not due to the work-related injury, but rather to the employee's intentional concealment of his past addiction.

This supervening independent cause was sufficient to sever the causal relationship between the claimant's work-related back injury and his readdiction to heroin following treatment with narcotics. In reference to the law in this area, the Fifth Circuit stated that the law begins with the rule that the concept of proximate cause, as it is applied in the law of torts, is not applicable in the LHWCA setting. ***Voris v. Texas Employers Ins. Ass'n***, 190 F.2d 929, 934 (5th Cir. 1951), cert. denied, 342 U.S. 932 (1952); ***Southern Stevedoring Co. v. Henderson***, 175 F.2d 863, 865 (5th Cir.1949).

patient eleven (11) times. Moreover, despite the characterization of his opinion by the Employer/Carrier, Dr. Bahner did not rule out surgery as an option. Neither party proffered respective qualifications of the physicians, so all other factors being equal, Dr. Coles has the best perspective to diagnose and treat his patient, and his opinion is more logical and his reports are better documented that are those of Dr. Bahner.

I find that Dr. Coles did not withdraw his opinion that the Claimant was a candidate for surgery. Moreover, I attribute great weight to this opinion. When an injured employee seeks benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), a treating physician's opinion is entitled to "special" weight. ***Amos v. Director, Office of Workers' Compensation Programs***, 153 F.3d 1051 (9th Cir., 1998) ; *See also*, ***American Stevedoring Ltd. v. Marinelli***, 248 F.3d 54, (2nd Cir., 2001)***; Lozada v. Director, Office of Workers' Compensation Programs***, U.S. Dept. of 1991 A.M.C. 303 C.A.2,1990; Longshore and Harbor Workers' Compensation Act, §§ 1 et seq. In ***Pietrunti v. Director, Office of Workers' Compensation Programs***, 119 F.3d 1035 (2nd Cir., 1997) an ALJ's findings were reversed by the court because he failed to attribute "great" weight to the opinion of a treating physician.

I must apply substantial evidence. ***Director v. Newport News Shipbuilding & Dry Dock Co., (Carmines)***, 138 F.3d 134, 140 (4th Cir.1998) states: "[t]he ALJ may not merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based." *Id.* To be sufficient the evidence must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." ***Richardson v. Perales***, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting ***Consolidated Edison Co. v. NLRB***, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938)) (internal quotation marks omitted); ***See v. Washington Metro. Area Transit Auth.***, 36 F.3d 375, 380 (4th Cir.1994). The ALJ may not merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based. Generally, I am entitled to give greater weight to opinion of treating physician than to that of non-treating physicians, ***Morehead Marine Services, Inc. v. Washnock***, 135 F.3d 366 (6th Cir., 1998).

Employer/Carrier argues that surveillance evidence clearly establishes that Claimant is not suffering from any residual disability as a result of his admittedly compensable injury. Claimant had indicated to his treating physicians an inability to use tools, inability to use his right arm, and an inability to perform anything other than supervisory work. EX 9, 16-20. However, Dr. Coles was advised concerning the representations about residual functional capacity that the Claimant made to him in the deposition.

> Q[Mr. Hanley]. The lateral epicondylitis, the inflammation, that's not going to affect necessarily — the inflammation itself is not going to affect the mobility of this right elbow, is that fair to say?
>
> A. No; it's the pain; it's the pain that limits it.
>
> Q. It's the pain that limits it, so if he's willing to accept a very high degree of pain he

could probably lift 100 pounds.

A. Yes.

Q. The question is how much pain that action caused him?

A. Yes; pain is the whole issue here.

Q. So, without knowing whether that action caused him pain, the action, itself, doesn't have much relevance?

[objection by Mr. Wilkins]

A. I don't know if it doesn't have any relevance but if he's willing to undergo pain to do that he could certainly do it.

Q. If I represent to you also Doctor that by August 22nd, 2001 his worker's compensation had been cut off . . . would that affect your perception of how much pain Mr. Fraser would be willing to undergo in order to earn some kind of income?

[Objection Mr. Wilkins]

A. Certainly people's motivation to feed themselves and keep shelter over themselves can drive them to work in the face of pain, but that's pure speculation.

CX 2., 32-33.

I also note that Dr. Coles had reservations about the use of the video to form an opinion regarding the Claimant's residual functional capacity for work. I, also, observed the Claimant carrying and hammering on the August video, despite the allegations of pain. But I accept that after his benefits were terminated, that the Claimant worked in spite of any pain he may have had, because he was motivated to work. I agree that work depicted by the video may have exceeded the Claimant's residual functional capacity. But this does not mean that he is symptom free or exaggerated his symptomology in testimony or in his examinations by Dr. Coles. I also find that the Employer/Carrier has not proved that the Claimant is able to work at the same level of function as before his injury. To the contrary, the Claimant has made a *prima facie* case for compensable medical treatment based on Dr. Coles' opinion, ***Turner,*** *supra.* Once the Claimant has done so, the burden must shift to the Employer/Carrier to show otherwise. Medical evidence has not been submitted to rebut Dr.Coles' opinion. Instead, the Employer/Carrier relies on the surveillance video, to attack the Claimant's credibility. I recognize that video can be a powerful tool for impeachment, but the Employer/Carrier did not offer any medical evidence to show that the video showed the claimant performing tasks that *preclude* a residual functional capacity for light work. Dr. Coles may have been asked to render such an opinion, but he did not do so. And the Employer/Carrier failed to establish that medically, or to any degree of medical probability, the Claimant had healed as of July 10, or that he would have healed if he had obeyed the restrictions set forth by Dr. Coles. Although Dr. Coles was shown the video, and was asked to recant, his original diagnosis and prognosis remain.

I also accept that the contemplated surgery is both necessary and reasonable given the circumstances. As long as the expense is both reasonable and necessary, it must be provided. ***Parnell v. Capitol Hill Masonry***, 11 BRBS 532, 539(1979). An employer is liable for medical services for all legitimate consequences of the compensable injury, including the chosen physician's unskillfulness or errors of judgment. ***Lindsay v. George Wash. Univ.***, 279 F.2d 819

(D.C. Cir. 1960); *see also* ***Austin v. Johns-Manville Sales Corp.***, 508 F. Supp. 313 (D.C. Me. 1981). The surgery would have been performed on an outpatient basis and would have taken Dr. Coles about twenty (20) minutes to perform, CX 2, 8. He testified that surgery was necessary due to the failure of the other treatments, Id, 10-11.

I also reject the Employer/Carrier's allegation that the Claimant was defrauding the Carrier in any way. The Employer/Carrier failed to establish that the Claimant mis-stated or even exaggerated his symptoms. Despite insinuations that the Claimant performed *sub rosa* work, the Employer/Carrier failed to show that the Claimant has unreported income, or that he was working off of the books or under the table. As to any allegations of malingering, the fact pattern is the inverse of the usual one, where a healthy Claimant refuses to work. Mr. Fraser has always maintained that he needed surgery based on a diagnosis from his first choice physician, so that he could return to full work status, as quickly as possible. He has tried to work since February 16. He notified the carrier when he was working. CX 7, Admissions 10 and 11. He told them he was trying to maintain his own business, Id.

It is more reasonable that the Carrier, knowing that the Claimant was attempting to work, and knowing that he was vulnerable, wrongfully prolonged the course of treatment. I also note that, in fact, that Dr.Coles inferred that unwarranted pressure by the Carrier intimidated him to release the Claimant from his care.

Discussion Re: Temporary Partial Disability

Section 908(e) states:

> (e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years

33USC §908(e).

33 USC § 914. Payment of compensation

> (c) Notification of commencement or suspension of payment. Upon making the first payment, and upon suspension of payment for any cause, the employer shall immediately notify the deputy commissioner, in accordance with a form prescribed by the commission, that payment of compensation has begun or has been suspended, as the case may be.

One who is temporarily and partially disabled is entitled to the usual measure of benefits but for the limited period of five years. Wages and time lost after the five-year period may not be considered in determining the amount of lost wage-earning capacity. ***St. Regis Paper Co. v. McManigal***, 67 F. Supp. 146 (N.D.N.Y. 1946). In ***Admiralty Coatings Corp. v. Emery***, 228 F.3d 513 (4 th Cir. 2000) the employer unsuccessfully challenged the ALJ's authority to award temporary
partial benefits beyond the date of the evidentiary hearing. The employer had argued that the

ALJ's
holding violated the APA's mandate that all findings and conclusions be supported by the evidence
of record.

The Board has held that where a claimant undergoes surgery, his condition is permanent only after recovery from surgery. ***Walker v. National Steel & Shipbuilding Co.***, 8 BRBS 525, 528 (1978); ***Edwards v. Zapata Offshore Co.***, 5 BRBS 429, 432 (1977). The mere possibility of future surgery, by itself, however, does not preclude a finding that a condition is permanent. ***Worthington v. Newport News Shipbuilding & Dry Dock Co.***, 18 BRBS 200, 202 (1986). In fact, a physician's opinion that a condition will progress and ultimately require surgery, but also giving a percentage disability rating, will support a finding that maximum medical improvement has been reached, if the disability will be lengthy, indefinite in duration, and lack a normal healing period. ***Morales v. General Dynamics Corp***., 16 BRBS 293, 296 (1984), *aff'd in pert.part sub nom*. ***Director, OWCP v. General Dynamics Corp***., 769 F.2d 66 **(2d Cir.** 1985). Even a claimant who has a scheduled injury, if still receiving treatment for the condition (which has not yet reached maximum medical improvement) and is employed but has sustained a loss of wage-earning capacity, and is entitled to temporary partial disability benefits based on such loss. ***Cox v. Newport News Shipbuilding & Dry Dock Co.***, 9 BRBS 791 (1978), *aff'd mem. sub nom*. ***Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP***, 594 F.2d 986 (4th Cir.1979). This case was decided before ***Potomac Electric Power Co. v. Director, OWCP***, 449 U.S. 268, 14 BRBS 363 (1980) (hereinafter, "PEPCO"). Since the PEPCO Court dealt only with permanent partial disability, ***Cox*** is not in conflict. This is important, as the Claimant is entitled to surgery and therefore has not achieved maximum medical improvement.

Claimant demands payment for February 16 to March 26, 2001, when no payments were made.

Claimant argues that because no doctor has released Mr. Fraser to return to full duty as a longshoreman, the denial of his medical benefits has delayed his return to any meaningful employment. He argues that once the longshoreman demonstrates that he cannot return to his usual employment, the employer must come forward with evidence establishing the post injury earning capacity. The party that contends that the actual post-injury wages are not representative has the burden of establishing an alternative wage earning capacity. ***Burch v. Superior Oil Co.***, 15 BRBS 423 (1983). Here there has been no evidence offered by the employer to establish alternative earning capacity.

Claimant argues further that he has produced the only evidence of post-injury wages. He had a small general contracting business and informed the carrier of this business. CX 7, Admissions 10, 11. However, because of his injury and the carrier's refusal to authorize surgery, this business failed and Mr. Fraser has had to seek protection from his creditors by filing for bankruptcy. TR 33. (Even if the business had not yet failed, any self employment earnings must be discounted due to the effect the injury may have on continued employment. ***Dupre v. Cape Romain Contractors***, 23 BRBS 86 (1989).) Although Mr. Fraser has tried to remain employed, he cannot continue

sustained physical activity with his right arm after a short period of time, and has lost these jobs. TR 33-35. Accordingly, Mr. Fraser argues that he has no real residual earning capacity at this time.

Section 8(h) of the LHWCA provides:

> (h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provide*d, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. § 908(h).

The average weekly wage is stipulated as $666.61. There is also no dispute that the Claimant was entitled to temporary partial benefits at a rate of $441.41 per week from March 26, 2001 to August 9, 2001, TR 6-9.

If a claimant establishes a *prima facie* case of total disability, the burden shifts to employer to establish suitable alternate employment. An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. The ALJ must allow the employer to present evidence as to the availability of the of suitable alternative employment, even if the employer does not have information as to the job's previous availability. ***Lucas v. Louisiana Ins. Guaranty Ass'n***, 28 BRBS 1 (1994). If the testimony relied upon by the judge provides substantial evidence to support his finding that post-injury work was available which constitutes suitable alternative employment, and the claimant has not presented any evidence of a reversible error, the Board will uphold the judge's evaluation of conflicting evidence and credibility. ***Trans-State Dredging v. Benefits Review Bd. (Tarner)***, 731 F.2d 199, 16 BRBS 74 (CRT) **(4th Cir.** 1984), *rev'g* ***Tarner v. Trans-State Dredging***, 13 BRBS 53 (1980); ***Mendoza v. Marine Personnel Co***., 46 F.3d 498, 500, 29 BRBS 79, 80-81 (CRT) (5th Cir. 1995);***Hawthorne v. Ingalls Shipbuilding, Inc***., 28 BRBS 73 (1994), modified on other grounds on recon., 29 BRBS 103 (1995).

Subsequent to August 10, the following earnings have been shown.

Dates	*Hours*	*Pay*
1. December 26 and January 1, 2002	32 hour work week,	$384.00.
2. January 23 to January 29, 2002	26 hour work week	312.00
3. March 20 to March 26, 2002	40 hour work week	480.00

See CX 5.

Although Mr. Calicott testified that he observed the Claimant working on August 22 and 23, no specific earnings records were proffered for the dates. Mr. Calicott also testified that he saw the Claimant working on March 19-20, 2002, and although these dates do not completely coincide with the payment records set forth by CX 5, they are not at complete variance with them, as the 20th does register as accurate. It is reasonable that the 2001 W-2's in CX 5 reflect the work performed in August and November, 2001, referenced by the Claimant's testimony. It is also reasonable that the March 20 to March 26 records reflect the work described by his testimony.

The Claimant argues that Mr. Fraser has no real residual earning capacity. Employer/Carrier argues that the Claimant admitted that he was working 30 to 40 hours a week in construction at the time this case was heard. TR 40.

> "Obviously, Claimant has retained a large measure of his earning capacity following his injury. Evidence presented by Defendants [Employer/Carrier] supports this proposition. Defendants have shown through surveillance efforts, that Claimant has regularly and consistently exhibited a pattern of behavior that clearly shows his ability to perform work at the same level of function as before his injury.

Any loss in earning capacity is determined by a comparison of what the injured worker was making before the injury, as opposed to what he was making, or was capable of making, after the injury. The first part of this equation, that of pre-injury earnings, must be an average (See 33 U.S.C. § 10(d)). Therefore, in order to "compare apples with apples," the second part of the equation should also be an average.

I find that the the claimant has established reasonable diligence in attempting to secure some type of
suitable alternate employment, and has surely demonstrated a willingness to work. ***Turney v. Bethlehem Steel Corp***., 17 BRBS 232, 236-37 n.7 (1985). See also ***Palombo v. Director, OWCP***, 937 F.2d 70, 25 BRBS 1 (CRT) (2dCir. 1991)**;** ***Trans-State Dredging,*** *supra*; ***Royce v. Elrich Constr. Co.***, 17 BRBS 157, 159 n.2 (1985). Although the Claimant's business installing hot water heaters failed, I find that job, as described, was heavy work and therefore the Claimant could not physically be expected to continue to perform the duties as the Claimant had to personally do the work. However, the work performed subsequently as described by the Claimant's testimony is credited as "light" as the majority of the work does not require extensive use of the dominant hand and elbow.

The burden shifts to the Employer at this point to provide jobs within the Claimant's residual functional capacity for light work that he may perform. Mr. Fraser did the Employer/Carrier's work, by looking for suitable alternative work on his own, and by finding it. I accept his testimony in part, that he was ready, willing and able to perform light work, but I do not accept that part where he denied that light work was available, because he performed light work for the major part of the time since August 10 and inferred that he is working that capacity now.

However, I find that I am not able to use the Claimant's actual earnings as the entire basis in determining his wage earning capacity. Neither party provided expert testimony on the Claimant's wage earning capacity as a light duty worker. Neither party provided a complete earnings record for the entire period of claim. Employer/ Carrier failed to provide any specific evidence with respect to dates and times in which Claimant's compensation should be withheld because he was performing work off the books or for reasons unrelated to his injury. Employer/Carrier failed to provide me with any argument regarding why benefits were unpaid from February 16 to March 26, 2001. And Employer/Carrier failed to provide me with any basis to recalculate the benefits paid for temporary partial disability to August 10. On the other hand, I reject Claimant's assertion he has no earning capacity.

Using parts pertinent of Section 10 of the Act with 8(h) as a basis for analogy, one measure may be:

> (a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.
> (c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee can not reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.
> .

The Claimant has provided intermittent earnings records. For the period from February 16 to December 26, 2001, I can not distinguish precisely which jobs were performed, and what the rate of pay may have been. I was not provided employment data from similarly situated employees. I was not provided the prior year's wages. However, all of the jobs shown by CX 5 for work in 2002 show that the Claimant earned $12.00 per hour when he was working. It is reasonable to expect, if the jobs were for the same employers and for the same type of jobs, that the hourly rate would be the same. I find that this is a reasonable wage for Claimant's light duty work based on his testimony, a review of the payment records and based on his residual functional capacity for

light work. The Claimant has tried to work at light work and testified that he had done it, whenever it had been offered to him. The Claimant testified that he would have worked throughout the period, and did not turn down any work, TR 46-48. I credit this testimony. My deliberation on this issue is to determine wage earning capacity at light work capacity versus the claimant's full pay in stevedoring. I also find that Mr. Fraser would have been and is able to perform light work, within his residual functional capacity, for a full forty (40) hour work week.

I find that the calculation for the Claimant's wage capacity can not be based on an average of the work reported, and I find that although the Claimant worked intermittently, crediting this aspect of his testimony, he could have performed light duty throughout the period after February 16, 2001. Therefore, I use the hourly rate as a basis for the daily method established by analogy to 33 USC § 908(h) and 33 USC §910(a) in part and to (c) in part. If the Claimant has a capacity to earn $12 per hour as a light duty employee, he can earn $96 per day [$12 x 8 = $96]. I can then use the daily method to calculate a weekly rate of pay. I note that the ultimate result is the same whether I calculate it on a daily or on a weekly basis. I find that the Claimant had the capacity to work at light duty for the period from March 26, 2001, and the Claimant remains in light duty status as he has not been released by a physician to full duty and that the difference per week is:

$666.41 (The stipulated average weekly wage)
less (-) 480.00 ($12 per hour times (x) 40 hours per week)
Yields 186.41 per week
x 2/3 = **$124.27** per week temporary partial disability payments.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. ***Avallone v. Todd Shipyards Corp***., 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. ***Watkins v. Newport News Shipbuilding & Dry Dock Co.***, 8 BRBS 556 (1978), **aff'd in pertinent part** and *rev'd on other grounds sub nom. **Newport News v. Director, OWCP***, 594 F.2d 986 (4th Cir. 1979); ***Santos v. General Dynamics Corp.***, 22 BRBS 226 (1989); ***Adams v. Newport News* Shipbuilding**, 22 BRBS 78 (1989); ***Smith v. Ingalls Shipbuilding***, 22 BRBS 26, 50 (1989); ***Caudill v. Sea Tac Alaska Shipbuilding***, 22 BRBS 10 (1988); ***Perry v. Carolina Shipping***, 20 BRBS 90 (1987); ***Hoey v. General Dynamics Corp.***, 17BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that "... the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills ...." ***Grant v. Portland Stevedoring Company***, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

DECISION

NOW, based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.
It is therefore **ORDERED** that:

1. The Employer/Carrier shall pay all continuing appropriate, reasonable, and necessary medical care and treatment of Claimant's elbow impairment under §7 of the Act including a lateral epicondyle release prescribed by Dr. Coles;

2. Employer/Carrier shall pay Mr. Fraser temporary total benefits at a rate of $441.41 per week from January 17, 2001 to February 15, 2001.

3. For the period from February 16, 2001 to the present, Employer/Carrier shall pay Claimant temporary partial disability benefits at a rate of $124.27 per week.

4. The Employer/Carrier shall pay interest on each unpaid installment for the period February 16 to March 26, 2001 and from August 10, 2001 until payment is made pursuant to the provisions of 28 U.S.C. §1961.

5. The District Director shall make all calculations necessary to carry out this order.

6. Employer shall receive a credit for all compensation already paid by Employer/Carrier to Claimant.

7. Within 30 days after this Decision and Order becomes final, counsel for the Claimant shall submit a fully supported application for costs and fees to the undersigned administrative law judge and to the counsel for the defendants. Within 15 days thereafter, the counsel for the defendants shall provide the Claimant's counsel with a written list specifically describing each and every objection to the proposed fees and costs. Within 15 days after receipt of such objections, the Claimant's counsel shall verbally discuss each of the objections with the counsel for the defendants. If the two counsel thereupon agree on an appropriate award of fees and costs they shall file written notification within ten days and shall also provide a statement of the agreed-upon fees and costs. Alternatively, if the counsel disagree on any of the proposed fees and costs, the Claimant's counsel shall within 15 days file a fully documented petition listing those fees and costs which are in dispute and set forth a statement of his position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by the counsel for the Employer/Carrier. The counsel for the Employer/Carrier shall have 15 days from the date of service of such application in which to respond. No reply to that reply will be permitted unless specifically authorized in advance.

SO ORDERED.

A

Daniel F. Solomon
Administrative Law Judge